

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DAVID E. RIGGS,	)	
	)	No. CV-08-0187-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT,
	)	DENYING PLAINTIFF'S MOTION TO
MICHAEL J. ASTRUE,	)	SUBMIT ADDITIONAL MEDICAL
Commissioner of Social	)	RECORDS AND GRANTING
Security,	)	DEFENDANT'S MOTION FOR SUMMARY
	)	JUDGMENT
Defendant.	)	
	)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 14, 22.) Also before the court is Plaintiff's Motion to Submit Additional Medical Records. (Ct. Rec. 16.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) Attorney Jeffrey Schwab represents Plaintiff; Special Assistant United States Attorney Richard Morris represents Defendant. After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion to file additional medical records and Motion for Summary Judgment, **GRANTS** Defendant's Motion for Summary Judgment, and directs entry of judgment in favor of Defendant.

Plaintiff protectively filed for disability insurance benefits on October 12, 2005, alleging an onset date August 30, 2005. (Tr.

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1 80, 62.) He claims disability due to back, leg and neck pain. He  
2 also alleges left knee, left arm and left shoulder pain. (Tr. 37,  
3 74, 82, 100.) Following a denial of benefits and reconsideration,  
4 a hearing was held before Administrative Law Judge (ALJ) Richard Say  
5 on January 17, 2008. (Tr. 269-90.) Plaintiff, who was represented  
6 by counsel, and vocational expert Debra LaPoint, testified. The  
7 ALJ denied benefits on February 12, 2008. (Tr. 12-22.) On April  
8 10, 2008, Plaintiff's representative submitted a Request for Review  
9 of the ALJ's hearing decision and a memorandum in support of review  
10 to the Appeals Council. Plaintiff did not submit additional medical  
11 records to the Appeals Council. (Tr. 7-8, 259-67.) Review was  
12 denied by the Appeals Council on May 9, 2008. (Tr. 4-7.) Plaintiff  
13 filed an appeal in this court on June 12, 2008. (Ct. Rec. 1.) On  
14 or about July 30, 2008, the Social Security Administration filed the  
15 Administrative Record for this case in paper format. (Ct. Rec. 11.)  
16 On October 6, 2008, Plaintiff filed his Motion for Summary Judgment.  
17 (Ct. Rec. 14.) On October 7, 2008, Plaintiff filed the motion to  
18 file additional medical records. (Ct. Rec. 16.) A cover letter to  
19 the Office of Hearings and Appeals in Spokane, Washington and the  
20 additional records were filed as Exhibit A to the motion. (*Id.* at  
21 5-92.) Jurisdiction is appropriate pursuant to 42 U.S.C. § 405(g).

#### 22 **STATEMENT OF FACTS**

23 The detailed facts of the case are found in the transcript of  
24 proceedings and are briefly summarized here. At the time of the  
25 hearing, Plaintiff was 44 years old, had an 11<sup>th</sup> grade education and  
26 a high school equivalency degree. (Tr. 271.) He was unmarried and  
27 lived with his fiancé and her three children in a house. Plaintiff

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1 had a long history of past relevant work as a printing pressman,  
2 which is classified as heavy work. (Tr. 90, 286.) At the time of  
3 his hearing, Plaintiff was working part-time as a home care provider  
4 for his fiancé who was hearing impaired and mentally handicapped.  
5 (Tr. 273, 276.) Plaintiff testified he could lift 15 to 20 pounds  
6 without pain, sit for about 20 minutes, stand 20 to 30 minutes and  
7 climb stairs. He did not know how far he could walk. (Tr. 277-78.)  
8 He stated weakness in his left hand made it difficult for him to  
9 hold on to things. (Tr. 278.) He reported he had been on  
10 depression medication for about one year, but had not gotten into  
11 counseling yet. (Tr. 278.) He stated he has had serious headaches  
12 for 20 years. (Tr. 284.) His activities of daily living included  
13 shopping and putting groceries away, vacuuming, cooking, driving,  
14 helping the children with home work, some fishing and visiting  
15 friends. He testified the oldest child did the yard work. (Tr.  
16 275, 277, 279-80, 283.) He stated he cannot work due to problems  
17 with his lower back, left hand, arm and leg, and headache pain.  
18 (Tr. 273.)

#### 19 ADMINISTRATIVE DECISION

20 The ALJ found Plaintiff met DIB insured status requirements  
21 through December 31, 2010. (Tr. 14.) At step one of the sequential  
22 evaluation, the ALJ concluded Plaintiff had not engaged in  
23 substantial gainful activity since the alleged onset date. (*Id.*)  
24 At step two, he found Plaintiff had the severe impairments of  
25 "degenerative disc disease and tendinitis of the left upper  
26 extremity." (*Id.*) The ALJ determined depression, headaches and  
27 carpal tunnel syndrome were not severe impairments. (Tr. 17-18.)

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1 At step three, he found Plaintiff's severe impairments alone or in  
2 combination did not meet the requirements of 20 C.F.R. Part 404,  
3 Subp. P, Appendix 1 (Listings). (Tr. 18.) The ALJ found  
4 Plaintiff's subjective symptom complaints were not entirely  
5 credible. (Tr. 20.) At step four, ALJ Say made the following  
6 residual functional capacity (RFC) determination:

7 [C]laimant has the residual functional capacity to perform  
8 light work except he would need to change positions every  
9 45-60 minutes. He can only occasionally climb ramps or  
10 stairs and should not climb ladders or scaffolds. He can  
11 occasionally engage in stooping, crouching, crawling,  
12 kneeling, or balancing. He can frequently reach,  
13 including overhead, and handle with the left upper  
extremity. He should avoid hazards such as heights and  
moving machinery. He should avoid industrial vibration.  
He takes medication for symptoms to include mild to  
moderate chronic pain, but is able to remain attentive,  
responsive, and reasonably alert to perform required job  
functions.

14 (Tr. 18.)

15 Based on the record and testimony from a vocational expert, the  
16 ALJ determined Plaintiff could not perform past relevant work. (Tr.  
17 21.) At the hearing, the ALJ propounded a hypothetical question to  
18 vocational expert Deborah N. Lapoint, which included the RFC  
19 limitations listed above. (Tr. 287-88.) The vocational expert  
20 testified there were jobs available the Plaintiff could perform,  
21 including cashier II, cafeteria attendant, and parking lot  
22 attendant. (Tr. 289.) At step five, the ALJ found Plaintiff could  
23 perform other work in the regional and national economy and  
24 therefore was not under at "disability" as defined by the Social  
25 Security Act. (Tr. 21-22.)

#### 26 STANDARD OF REVIEW

27 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
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1 court set out the standard of review:

2 The decision of the Commissioner may be reversed only if  
 3 it is not supported by substantial evidence or if it is  
 4 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
 5 1097 (9th Cir. 1999). Substantial evidence is defined as  
 6 being more than a mere scintilla, but less than a  
 7 preponderance. *Id.* at 1098. Put another way, substantial  
 8 evidence is such relevant evidence as a reasonable mind  
 9 might accept as adequate to support a conclusion.  
 10 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
 11 evidence is susceptible to more than one rational  
 12 interpretation, the court may not substitute its judgment  
 13 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
 14 *Morgan v. Commissioner of Soc. Sec. Admin.* 169 F.3d 595,  
 15 599 (9th Cir. 1999).

16 The ALJ is responsible for determining credibility,  
 17 resolving conflicts in medical testimony, and resolving  
 18 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 19 Cir. 1995). The ALJ's determinations of law are reviewed  
 20 *de novo*, although deference is owed to a reasonable  
 21 construction of the applicable statutes. *McNatt v. Apfel*,  
 22 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 13 SEQUENTIAL EVALUATION PROCESS

14 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 15 requirements necessary to establish disability:

16 Under the Social Security Act, individuals who are  
 17 "under a disability" are eligible to receive benefits. 42  
 18 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 19 medically determinable physical or mental impairment"  
 20 which prevents one from engaging "in any substantial  
 21 gainful activity" and is expected to result in death or  
 22 last "for a continuous period of not less than 12 months."  
 23 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 24 from "anatomical, physiological, or psychological  
 25 abnormalities which are demonstrable by medically  
 26 acceptable clinical and laboratory diagnostic techniques."  
 27 42 U.S.C. § 423(d)(3). The Act also provides that a  
 28 claimant will be eligible for benefits only if his  
 impairments "are of such severity that he is not only  
 unable to do his previous work but cannot, considering his  
 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 the definition of disability consists of both medical and  
 vocational components.

1 In evaluating whether a claimant suffers from a  
2 disability, an ALJ must apply a five-step sequential  
3 inquiry addressing both components of the definition,  
4 until a question is answered affirmatively or negatively  
5 in such a way that an ultimate determination can be made.  
6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
7 claimant bears the burden of proving that [s]he is  
8 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
9 1999). This requires the presentation of "complete and  
10 detailed objective medical reports of h[is] condition from  
11 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
12 404.1512(a)-(b), 404.1513(d)).

## 13 ISSUES

14 The question presented is whether there was substantial  
15 evidence to support the ALJ's decision denying benefits and, if so,  
16 whether that decision was based on proper legal standards.  
17 Specifically, Plaintiff asserts the ALJ erred when he (1) found  
18 Plaintiff's mental impairments were not severe; 2) found Plaintiff's  
19 impairments did not meet or equal the Listings at step three; (3)  
20 did not obtain medical expert testimony; (4) failed to fully develop  
21 the record by ordering a psychological evaluation; (5) found  
22 Plaintiff was not credible; and (6) improperly relied on medical  
23 reports related to his workers compensation claim. (Ct. Rec. 15 at  
24 4-8.) By separate motion, Plaintiff requests additional medical  
25 records which were not considered by the ALJ or the Appeals Council,  
26 be included in the record. (Ct. Rec. 16.) Defendant responds that  
27 the ALJ's decision is supported by substantial evidence and free of  
28 legal error. He also objects to admission of the additional records  
because they do not meet the standard under 42 U.S.C. § 405 (g).  
(Ct. Rec. 23.)

## DISCUSSION

### A. New Evidence

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1 If new evidence submitted by Plaintiff after the ALJ has  
2 rendered his decision is considered by the Appeals Council, it  
3 becomes part of the record on *de novo* review by district court.  
4 *Ramirez v. Shalala*, 8 F.3d 1449, 1451-52 (9<sup>th</sup> Cir. 1993) Where, as  
5 here, the new evidence was neither considered by the ALJ nor the  
6 Appeals Council, the district court may remand the case for review  
7 by the ALJ if (1) the evidence is new and material, and (2) there is  
8 good cause why it was not previously presented to the ALJ. 42  
9 U.S.C. 405(g); *Mayes v. Massanari*, 276 F.3d 453, 462 (9<sup>th</sup> Cir. 2001);  
10 *Booz v. Secretary of Health & Human Servs.*, 734 F.2d 1378, 1380 (9<sup>th</sup>  
11 Cir. 1984). Remand for consideration of new evidence is only  
12 appropriate if the new evidence shows there is a reasonable  
13 possibility that it would change the outcome of the ALJ's  
14 determination. *Mayes*, 276 F.3d at 462.

15 Plaintiff's representative mailed the records at issue to the  
16 hearings office the day before Notice of the ALJ's unfavorable  
17 decision was mailed, and there is no mention of the new records  
18 dated 1998-2003, in the ALJ's summary of the medical evidence. (Ct.  
19 Rec. 16 at 5; Tr. 9, 14-18.) Therefore, it is apparent the ALJ did  
20 not receive the additional records prior to rendering his decision.  
21 Furthermore, Plaintiff's representative did not include the  
22 additional records in his Request for Review to the Appeals Council.  
23 (Tr. 8, 259-67.) Since there is no reference to additional medical  
24 records submitted after the ALJ decision in the Notice of Appeals  
25 Council Action, (Tr. 4-7), the Appeals Council did not consider the  
26 newly submitted medical records now before this court. The court  
27 has reviewed the new evidence to determine if it meets the standards

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1 under 42 U.S.C. § 405 (g), and if so, whether remand for  
2 consideration by the ALJ is appropriate.

3 The new evidence includes records from East Wenatchee Clinic  
4 (EWC) and Wenatchee Valley Clinic (WVC), dated from 1998 to January  
5 2008. (Ct. Rec. 16 at 6-92.) Records from 1998 to 2003 address  
6 medical treatment unrelated to Plaintiff's claim. A number of the  
7 records are duplicates of transcript records.<sup>1</sup> The remaining  
8 records do not provide new, material information regarding  
9 Plaintiff's condition. *Mayes*, 276 F.3d at 462; *Booz*, 734 F.2d at  
10 1381 ("material" evidence bears "directly and substantially on the  
11 matter in dispute" and there is a "reasonable possibility" that it  
12 would have changed the ALJ's decision).

13 For example, the newly submitted EWC treatment notes, dated  
14 August 2005 through May 2007, show Plaintiff was treated for routine  
15 health problems and chronic pain. (Ct. Rec. 16 at 58-68.) The EWC  
16 records dated from May 2005 to May 1, 2007, show treating physician  
17 Michael Abbott, M.D. (who is a treating physician in records before  
18 the ALJ) noted Plaintiff's ongoing self-report of moderate distress  
19 from back, shoulder and arm pain, treated with narcotic pain  
20 killers. (*Id.* at 43-67.) In May 2007, Dr. Abbott reported  
21

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22 <sup>1</sup> The transcript of proceedings reviewed by the ALJ and the  
23 Appeals Council includes medical records from Wenatchee Valley  
24 Hospital, EWC, WVC, and Wenatchee Valley Medical Center, dated May  
25 2005 through November 2007. (See Tr. 14-18, 122-228, 251-257.) In  
26 addition, there is an independent medical examination report dated  
27 March 2007. (Tr. 235-244.)

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1 Plaintiff's workers compensation claim was closed and noted  
2 Plaintiff's complaints of depression and anxiety. He opined  
3 Plaintiff would be stable enough in 90 days to start job training.  
4 He also indicated Plaintiff was going to apply for unemployment  
5 benefits. (*Id.* at 68.) In June 2007, Plaintiff was unwilling to  
6 take anti-depressants, but in July 2007, he started depression  
7 medication which he reported was working well in August 2007.<sup>2</sup> (*Id.*  
8 at 69-71.) Treatment notes from October 2007, show Plaintiff  
9 reported working 65 hours per month as a home care provider,  
10 consistent with the ALJ's findings. (*Id.* at 74, Tr. 12.) In  
11 November 2007, Plaintiff reported pain-related depression and Dr.  
12 Abbott increased his anti-depression dosage. (Ct. Rec. 16 at 76.)  
13 In December 2008, Plaintiff reported being advised by his attorney  
14 to get counseling for his increasing depression and anger; Dr. Abbot  
15 wrote a referral for a mental health evaluation and indicated  
16 Plaintiff would call for an appointment. (*Id.* at 77.) On January  
17 18, 2008, Dr. Abbott observed Plaintiff's trouble bending over to  
18 pick up an object on the floor, noted moderate distress due to  
19 chronic pain and refilled narcotic pain medication; he also had  
20 Plaintiff sign a pain contract. (*Id.* at 78.)

21 The new "material" records from WVC include an imaging report  
22 of Plaintiff's lumbar spine at the time of his industrial injury  
23 showing normal disc space and no abnormalities. (*Id.* at 82-90.) An  
24

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25 <sup>2</sup> It is noted on review that this new treating physician  
26 record conflicts with Plaintiff's January 17, 2008, testimony that  
27 he had been taking depression medication for one year. (Tr. 278.)

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1 October 2005 imaging report showed a normal kidney. (*Id.* 91.)

2 It appears that all but the January 18, 2008, record from Dr.  
3 Abbott was available for submission prior to or at the ALJ hearing  
4 on January 17, 2008. Plaintiff has not shown good cause for not  
5 presenting these records to the ALJ prior to the hearing. Plaintiff  
6 did not object to the record as described by the ALJ at the hearing,  
7 did not request extra time to submit records after the hearing, and  
8 did not contest evidence reviewed by the Appeals Council. (Tr. 4-7,  
9 270.)

10 Even if good cause for Plaintiff's failure to present the new  
11 evidence to the ALJ were established, the new records that relate to  
12 the period at issue contain no evidence that would raise a  
13 reasonable possibility that the outcome would change if the evidence  
14 were remanded to the ALJ for consideration. The reports of pain,  
15 treatment, and imaging results are consistent with the reports  
16 reviewed by the ALJ before rendering his decision. Contrary to  
17 Plaintiff's argument, the ALJ considered Plaintiff's hearing  
18 testimony, and noted he was taking antidepressants but not engaging  
19 in counseling, before he found depression caused no more than a  
20 minimal effect on Plaintiff's ability to work. (Tr. 17, 278.) The  
21 new evidence supports this finding.<sup>3</sup> (Ct. Rec. 16 at 71, 74, 77.)

22 The new evidence does not meet the standard under 42 U.S.C. §  
23 405 (g); therefore, remand for consideration by the Commissioner of  
24

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25 <sup>3</sup> See *infra* at Section B.2. for further discussion of  
26 Plaintiff's objections to the ALJ's findings regarding depression.  
27

1 this evidence is not warranted. Plaintiff's motion for leave to  
2 submit additional medical records is **DENIED**.

3 **B. Step Three Evaluation**

4 At step three of the sequential evaluation, the Commissioner  
5 must determine if Plaintiff's severe impairments, alone and in  
6 combination, meet or equal a Listing. The Listings were promulgated  
7 by the Commissioner to describe various illnesses and abnormalities,  
8 categorized by the various body systems, that are considered severe  
9 enough to prevent substantial gainful activity "regardless of age,  
10 education or work experience." 20 C.F.R. § 404.1525; *Sullivan v.*  
11 *Zebley*, 493 U.S. 521, 529-30 (1990). The claimant has the burden of  
12 proof at step three. *Roberts v. Shalala*, 66 F.3d 179, 182 (9<sup>th</sup> Cir.  
13 1995). To show he meets a Listing, the claimant must establish that  
14 he meets each criteria of the listed impairment relevant to his  
15 claim. *Sullivan*, 493 U.S. at 531. If a claimant's impairments do  
16 not meet the Listing exactly, a finding of "disabled" may be  
17 appropriate if his impairments in combination "equal" a Listing. To  
18 prove that he "equals" a Listing, "a claimant must establish  
19 symptoms, signs and laboratory findings 'at least equal in severity  
20 and duration' to the characteristics of a relevant listed  
21 impairment." *Tackett*, 180 F.3d at 1099 (quoting 20 C.F.R. §  
22 404.1526). That is to say, evidence of other significant objective  
23 medical findings, along with a cogent argument, must be presented to  
24 raise presumption of disability at step three. See e.g. *Marcia v.*  
25 *Sullivan*, 900 F.2d 172 (9<sup>th</sup> Cir. 1990) (). Absent significant  
26 medical evidence of the requisite criteria and a plausible theory  
27

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the ALJ is not required to explain why equivalency is not established. *Gonzalez v. Sullivan*, 914 F.2d 1194, 1201 (9<sup>th</sup> Cir. 1990).

1. Musculoskeletal Listings

Plaintiff argues he meets or equals Listing 1.04A, which describes disabling spine disorders.<sup>4</sup> He also contends the ALJ erred when he failed to consider Plaintiff's mental health impairments in his step three evaluation. He argues the ALJ should

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<sup>4</sup> Listing 1.04 is as follows:

1.04 *Disorders of the spine* (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture), resulting in compromise of a nerve root (including the cauda equina) or the spinal cord. With:

A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitations of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight-leg raising test (sitting and supine);

or

B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position more than once every 2 hours;

or

C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness and resulting in inability to ambulate effectively as defined in 1.00B2b.

20 C.F.R. pt. 404, subpt. P, app. 1, 104.

1 have developed the record further by ordering a psychological  
2 consultative examination and obtaining medical expert testimony on  
3 the issue of equivalency. (Ct. Rec. 15 at 4.)

4 At the hearing, Plaintiff's representative referenced exhibits  
5 admitted at the hearing and argued the documented low back problems  
6 showed "functional weaknesses" that supported a finding that his  
7 impairments met or equaled Listing 1.04A. (Tr. 270-71.) In his  
8 memorandum in support of summary judgment, Plaintiff cites sections  
9 of medical reports that note limited range of motion, positive  
10 straight leg raise test, complaints of lower extremity weakness and  
11 pain. (Ct. Rec. 15 at 6-7.) However, it is not sufficient to  
12 assert generalized functional limitations or rely on subjective  
13 symptoms to satisfy the step three burden. *Tackett*, 180 F.3d at  
14 1099. "Medical equivalence must be based on medical findings." 20  
15 C.F.R. § 404.1526. Plaintiff also references a June 2005, MRI that  
16 showed "evidence of mild disk degeneration and a left paracentral  
17 and lateral disk bulge," associated with "very mild foraminal  
18 narrowing;" and an August 2005 "EMG that suggested possible  
19 involvement of the L4-L5 nerve root." (Tr. 195, 212.) However,  
20 other evidence in the record indicates the June 2005 MRI results  
21 were reviewed by Alfred Higgins, M.D., neurosurgeon, who found "no  
22 evidence of significant neural impingement at any level of the  
23 lumbar spine and this is considered essentially a normal MRI scan."  
24 Dr. Higgins opined there were no structural anatomic abnormalities  
25 and there was no need for surgical intervention. (Tr. 168, 213-14.)  
26 As noted by the ALJ in his review of the entire medical record,

27  
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1 Plaintiff was working full-time at restricted (light) duty in June  
2 2005. (Tr. 15.) His treatment providers considered his condition  
3 "fixed and stable." (Tr. 200.)

4 An April 21, 2006, MRI study showed a stable-appearing lumbar  
5 spine with no significant abnormalities, and mild narrowing at the  
6 L4-L5, with some disk protrusion. There was no evidence of nerve  
7 root impingement. (Tr. 239.) Finally, a MRI radiology report  
8 dated July 30, 2007, indicated a "mild degree of disc space  
9 narrowing" at L4-L5, but otherwise, the lumbar spine was within  
10 normal limits. Nerve root compression was not indicated. (Tr. 251-  
11 52.) In December 2006, treating physician Stephen Huffman, M.D.,  
12 opined Plaintiff could work at the cashier II job category.<sup>5</sup> (Tr.  
13 234.) Plaintiff points to no medical evidence that establishes  
14 nerve root compression (an essential criterion in Listing 1.04A)  
15 that lasted or was expected to last 12 months and offers no cogent  
16 theory as to how his condition otherwise equals Listing 1.04A. The  
17 ALJ's finding that Plaintiff's back impairment does not meet or  
18 equal Listing criteria is supported by substantial evidence in the  
19 record.

## 20 2. Impairments in Combination

21 Plaintiff appears to argue the ALJ's finding at step two that  
22 his depression was not severe and his failure to consider depression  
23 in combination with his back impairment at step three were legal  
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25 <sup>5</sup> Plaintiff's objection to physician work releases is  
26 discussed below at Section E.  
27

1 error. He asserts his impairments in combination equal a Listing.  
2 (Ct Rec. 15 at 6.) This argument is unsupported by the evidence.  
3 As stated in the Commissioner's policy Ruling, "The mere  
4 accumulation of a number of impairments will not establish medical  
5 equivalency. In no case are symptoms alone a sufficient basis for  
6 establishing the presence of a physical or mental impairment."  
7 *Social Security Ruling (SSR) 86-8 at \*4.*

8 Contrary to Plaintiff's assertions, the ALJ's finding that  
9 depression was not a severe impairment is supported by substantial  
10 evidence. As is the case at step three, Plaintiff has the burden  
11 of proof at step two. The ALJ discussed Plaintiff's depression at  
12 step two. As mentioned above, he specifically noted Plaintiff was  
13 taking anti-depressant medication, and concluded depression symptoms  
14 imposed no more than minimal limitation on his ability to work, *i.e.*  
15 depression was not severe. (Tr. 17-18.) This finding is supported  
16 by substantial evidence in the record, including Plaintiff's own  
17 testimony. For example, Plaintiff did not allege a mental  
18 impairment in his application, and treating provider records did not  
19 mention depression as causing serious problems in Plaintiff's life.  
20 (Tr. 17-18.) Plaintiff listed no limitations due to depression in  
21 his daily activities questionnaire. (Tr. 66-72, 100.)  
22 Significantly, although Plaintiff stated at the hearing that he was  
23 taking medication and would like to go to counseling, he did not  
24 describe restrictions in his daily activities caused by depression  
25 at the hearing. (Tr. 273-85.) He attributed his lack of  
26 socializing and decreased recreational activities to back and leg

1 pain. (Tr. 277, 279.)

2 It is also noted on independent review Plaintiff's testimony  
3 that he had been taking anti-depression medication for "almost a  
4 year" is not supported by objective medical evidence reviewed by the  
5 ALJ, or by new records submitted to this court.<sup>6</sup> As discussed, new  
6 records from Dr. Abbott show Plaintiff first complained of  
7 depression in May 2007, and medication was not prescribed until July  
8 2007. Plaintiff reported medication was working well by August  
9 2007, and he did not follow-up on a counseling referral. This is  
10 consistent with Plaintiff's testimony at the hearing. Neither the  
11 evidence in the record, nor Plaintiff's own subjective complaints at  
12 the hearing reflect more than a minimal effect on Plaintiff's  
13 ability to perform basic work activities.<sup>7</sup> Therefore, the ALJ did  
14 not err in finding depression was not severe. The ALJ was not  
15 obliged to consider non-severe depression in combination with  
16 Plaintiff's severe back impairments at step three 20 C.F.R. §

17 \_\_\_\_\_  
18 <sup>6</sup> The ALJ also found Plaintiff's subjective complaints and  
19 testimony not entirely credible. (Tr. 20.) His credibility  
20 findings, which are discussed below, are "clear and convincing" and  
21 supported by substantial evidence.

22 <sup>7</sup> Even if it were demonstrated through objective medical  
23 evidence that depression caused more than mild limitations, the  
24 duration requirement that an impairment must have lasted or expected  
25 to last for a continuous period of not less than 12 months is not  
26 satisfied. 20 C.F.R. § 404.1509.

1 404.1526 (medical equivalence to a listed severe impairment is based  
2 on consideration of impairments of equal medical significance to the  
3 required criteria).

4 Plaintiff offers no evidence of more than minimal effects of  
5 self-reported depression and offers no theory why mild depression  
6 combined with low back pain would be equivalent to Listing 1.04A or  
7 any other Listing. Plaintiff's statements alone cannot establish a  
8 severe impairment at step two or disability at step three. 20  
9 C.F.R. §§ 404.1508, .1523; *Tackett*, 180 F.3d at 1100 (mere assertion  
10 of equivalency does not meet step three burden). The record in its  
11 entirety supports the ALJ's step three findings.

12 **C. Duty to Develop Record**

13 Plaintiff next asserts the ALJ had a duty to develop the record  
14 by obtaining (1) medical expert testimony on the equivalence issue,  
15 and (2) a consultative psychological examination. (Ct. Rec. 15 at  
16 4-5). As a threshold to establishing an impairment, it is the  
17 claimant's responsibility to produce sufficient objective medical  
18 evidence of underlying impairment. 20 C.F.R. § 404.1512 (c). Once  
19 medical evidence is provided by the claimant, the Regulations state  
20 the agency "will develop your complete medical history for at least  
21 the 12 months preceding the month in which you file your application  
22 unless . . . you say that your disability began less than 12 months  
23 before you filed your application." 20 C.F.R. § 404.1512 (d). An  
24 ALJ's duty to develop the record further is triggered "only when  
25 there is ambiguous evidence or when the record is inadequate for  
26 proper evaluation of evidence." *Mayes*, 276 F.3d at 459-60.

1        1. Medical Expert

2        "At all times, the burden is on claimant to establish [his]  
3 entitlement to disability insurance benefits." *Tidwell v. Apfel*,  
4 161 F.3d 599, 601 (9<sup>th</sup> Cir. 1998). At step three, Plaintiff must  
5 provide objective medical evidence to establish each criterion in  
6 the Listing and present a theory of how his medically determinable  
7 impairments meet or equal a specific Listing. *Tackett*, 180 F.3d at  
8 1099. "The responsibility for determining medical equivalence rests  
9 with the Administrative Law Judge or Appeals Council." 20 C.F.R. §  
10 404.1526 (e). The Commissioner has ruled that medical expert  
11 testimony on the issue of equivalence is required only when the ALJ  
12 finds the evidence suggests a "judgment of equivalence may be  
13 reasonable." SSR 96-6p. As discussed above, the record reasonably  
14 supports the ALJ's determination that Listing 1.04A is neither met  
15 nor equaled. Listing 1.04A requires evidence of "nerve root  
16 compression." A finding of equivalence must be based on  
17 alternative significant medical evidence and a plausible theory.  
18 Specialists and treating physicians found no evidence of nerve root  
19 compression or lumbar spine abnormalities. (Tr. 198, 213-14, 239-  
20 40.) Because there is no medical evidence in the record to  
21 establish the necessary Listing criteria (including the duration  
22 requirement) or equivalence, and the evidence relating to  
23 Plaintiff's spine condition is neither ambiguous nor inadequate to  
24 properly evaluate the evidence presented, the ALJ was not required  
25 to obtain medical expert testimony.

26        2. Consultative Examination

27  
28 ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,  
DENYING PLAINTIFF'S MOTION TO SUBMIT  
ADDITIONAL MEDICAL RECORDS AND GRANTING  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 18

1 Plaintiff asserts the ALJ should have ordered a psychological  
2 examination to assess the severity of his depression. (Ct. Rec. 15  
3 at 4.) Consultative exams are purchased by the Commissioner to  
4 resolve conflicts or ambiguities "if one exists." 20 C.F.R. §  
5 404.1519a(a)(2). As discussed above, the ALJ's duty to supplement  
6 the record arises where there is ambiguity in the existing record,  
7 or if what evidence does exist is inadequate for proper evaluation.  
8 However, this duty arises only if the evidence already present  
9 consistently favors the claimant. *Lewis v. Apfel*, 236 F.3d 503,  
10 514-15 (9<sup>th</sup> Cir. 2001).

11 Here, as found by the ALJ, Plaintiff did not allege a mental  
12 impairment in his application, and treating provider records did not  
13 mention depression as causing serious problems in Plaintiff's life.  
14 (Tr. 17-18.) As discussed above, the ALJ's findings that  
15 Plaintiff's depression was non-severe are supported by substantial  
16 evidence. Because the evidence before the ALJ did not favor  
17 Plaintiff's claim of severe depression, and did not suggest the  
18 "existence of a condition which could have a material impact on the  
19 disability decision," the ALJ was not required to order a  
20 consultative examination. *Hawkins v. Chater*, 113 F.3d 1162, 1167  
21 (10<sup>th</sup> Cir. 1997.)

#### 22 **D. Credibility**

23 Plaintiff contends the ALJ erred when he rejected Plaintiff's  
24 credibility solely because his subjective complaints "exceeded the  
25 objective medical findings." (Ct. Rec. 15 at 4.) In assessing a  
26 claimant's credibility, the ALJ must engage in a two-step analysis  
27

1 in deciding whether to give weight to subjective symptom testimony.  
2 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the  
3 first step, the claimant must produce objective medical evidence of  
4 an underlying "impairment," and must show that the impairment, or a  
5 combination of impairments, "could reasonably be expected to produce  
6 pain or other symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9<sup>th</sup>  
7 Cir. 1986). Once the *Cotton* test is met, the ALJ must evaluate the  
8 credibility of the claimant. *Smolen*, 80 F.3d at 1281-82. If there  
9 is no affirmative evidence of malingering, the ALJ must provide  
10 "clear and convincing" reasons for rejecting Plaintiff's pain and/or  
11 symptom testimony. *Rollins v. Massanari*, 261 F.3d 853, 858 (9<sup>th</sup> Cir.  
12 2001); *Smolen*, 80 F.3d at 1283-84. If the ALJ's credibility  
13 findings are supported by substantial evidence in the record, the  
14 court may not engage in second-guessing. *See Morgan*, 169 F.3d at  
15 600; *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989) (In reviewing a  
16 denial of benefits, the court is not the trier of fact;  
17 "credibility determinations are the province of the ALJ").

18 Here, after summarizing the medical record, the ALJ discussed  
19 Plaintiff's testimony, noting his statements that he was unable to  
20 work due to left arm weakness, left leg and lower back pain, and  
21 frequent headaches which lasted a day or two; that he has had  
22 headaches for over 20 years and now has a limp, with pain down his  
23 leg to his foot; that he had bad days "about three times a week,"  
24 when he could only lie in bed; that he was being paid to care for  
25 his fiancé; that he cared for her children by cooking, shopping  
26 (with a child who helps lift things), and that he drives and

1 vacuums, helps the children with school work and attends some school  
2 activities. (Tr. 19.)

3 "An ALJ cannot be required to believe every allegation of  
4 disabling pain, or else disability benefits would be available for  
5 the asking, a result plainly contrary to 42 U.S.C. s 423 (d) (5) (A .  
6 . . . This holds true even where the claimant introduces medical  
7 evidence showing that he has an ailment reasonably expected to  
8 produce some pain; many medical conditions produce pain not severe  
9 enough to preclude gainful employment." *Fair*, 885 F.2d at 603. As  
10 explained by the Commissioner in his policy Ruling, the ALJ need not  
11 totally reject a claimant's statements; he may find the claimant's  
12 statements about pain to be credible to a certain degree, but  
13 discount statements based on his interpretation of evidence in the  
14 record as a whole. *SSR 96-7p*. "For example, an adjudicator may  
15 find credible an individual's statement as to the extent of the  
16 functional limitations or restrictions due to symptoms; *i.e.*, that  
17 the individual's abilities to lift and carry are compromised, but  
18 not to the degree alleged." *Id.*

19 Lack of objective medical evidence to establish severity of  
20 pain is one factor that may be considered by the ALJ, as long as it  
21 is not the only reason. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup>  
22 Cir. 1991). The ALJ also may consider the following factors when  
23 weighing the claimant's credibility: the claimant's reputation for  
24 truthfulness; inconsistencies in his testimony or between his  
25 testimony and conduct; activities of daily living; work record; and  
26 testimony from physicians and third parties concerning the

1 claimant's subjective symptom complaints. *Light v. Social Security*  
2 *Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997).

3       The ALJ found Plaintiff's complaints of pain and limitations  
4 were "excessive and not consistent with clinical evidence." (Tr.  
5 20.) In addition to finding that objective evidence did not support  
6 the severity of Plaintiff's complaints, the ALJ properly made  
7 additional "clear and convincing" findings to support his  
8 determination. (Tr. 19-20.) He referenced observations by treating  
9 physicians of excessive pain behavior on examination, 4/5 to 5/5  
10 measurement of strength upon physical examination of both  
11 extremities, and varying (but fairly mild) measures of decreased  
12 range of motion. (Tr. 19.) These findings are supported by  
13 treatment notes and physician reports. (Tr. 143, 151, 154, 186,  
14 200.) The ALJ also noted that Plaintiff's treating medical  
15 providers placed him on light duty in 2005, 2006, and 2007 (Tr. 142,  
16 200); and in 2007, examining specialists, Drs. Thut and Smith,  
17 opined Plaintiff was capable of light work. (Tr. 19-20, 242; see  
18 *infra* Section E., for discussion of Plaintiff's objections to this  
19 evaluation and work releases from treating providers.) Further, the  
20 ALJ noted Plaintiff's description of daily activities that were  
21 inconsistent with his claims of total disability, including cooking,  
22 caring for his fiancée and her children, various household chores,  
23 socializing, and fishing which he no longer did "due to lack of  
24 money." (Tr. 19.) These findings are "clear and convincing" and  
25 combined with the lack of objective medical evidence, they  
26 reasonably support the ALJ's discounting Plaintiff's subjective  
27

1 complaints.

2 **E. Labor and Industries Related Reports**

3 Plaintiff appears to object to weight given by the ALJ to  
4 "releases for employment by treating providers," and the independent  
5 medical evaluation by David Thut, M.D. (orthopedic surgeon) and  
6 Arthur Smith, M.D. (neurologist), dated March 10, 2007. (Ct. Rec.  
7 15 at 7-8.) He argues these records are related to his workers  
8 compensation claim and, thus, are unreliable because they "are not  
9 based upon substantial evidence utilized in the Social Security  
10 system," and do not "cite to the mental health condition for which  
11 Plaintiff has been treated." (Ct. Rec 15 at 7-8.) His argument is  
12 supported neither by legal authority nor facts.

13 Regarding consideration of mental health conditions by the  
14 examining specialists, as discussed above, the ALJ properly found  
15 there was very little mention of depression in the record and it  
16 caused no more than minimal limitations on his ability to work.  
17 (Tr. 18; see *supra* at page 15-16.) Further, it is noted on  
18 independent review that the disputed evaluation was conducted before  
19 Plaintiff's first documented complaints and treatment of depression  
20 in May-July 2007.<sup>8</sup> (Ct. Rec. 16 at 68-71.) Therefore, Plaintiff's  
21 mental health condition did not appear to be an issue at the time of  
22 he was evaluated by Drs. Thut and Smith.

23 The ALJ acknowledged that the independent medical evaluation  
24

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25 <sup>8</sup> Plaintiff's medication list in the record does not include  
26 the "date first prescribed" for the depression medicine. (Tr. 258.)  
27

1 was conducted at the request of the Department of Labor and  
2 Industries "to evaluate two open claims involving an injury on May  
3 6, 2005 of a lumbar sprain, and one involving manifestation of  
4 symptoms on June 6, 2006 of left epicondylitis with tenosynovitis."  
5 (Tr. 236.) The Ninth Circuit has held in disability proceedings  
6 that "the purpose for which medical reports are obtained does not  
7 provide a legitimate basis for rejecting them." *Lester v. Chater*,  
8 81 F.3d 821, 832 (9<sup>th</sup> Cir. 1995). Further, both examining physicians  
9 are specialists, and their opinions are given considerable weight  
10 about medical issues in their area of speciality. 20 C.F.R. §  
11 404.1527(d) (5). The examining specialists found no work  
12 restrictions related to the industrial injury or "non-industrial  
13 conditions." (Tr. 242.)

14 The Plaintiff does not assert, and there is no indication in  
15 the record, that the Labor and Industries evaluation was controlling  
16 in the ALJ's final determination. On the contrary, the ALJ  
17 discussed the Labor and Industries independent medical evaluation in  
18 his thorough summary of the entire medical record. (Tr. 17.) He  
19 properly considered it with medical opinions from treating doctors,  
20 agency doctors, specialists, as well as objective imaging reports,  
21 treatment notes from Plaintiff's providers, and Plaintiff's hearing  
22 testimony. (Tr. 14-20.) Plaintiff's argument that the ALJ's  
23 erroneously relied on medical records related to his Labor and  
24 Industries claim fails.

#### 25 CONCLUSION

26 The ALJ's findings are supported reasonably by substantial  
27

evidence and free of legal error. Where, as here, substantial evidence reasonably supports the Commissioner's decision, that decision must be affirmed. Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is **DENIED**

2. Plaintiff's Motion to Submit Additional Medical Records (**Ct. Rec. 16**) is **DENIED**;

2. Defendant's Motion for Summary Judgment dismissal (**Ct. Rec. 22**) is **GRANTED**.

3. The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. The file shall be **CLOSED** and judgment entered for Defendant.

DATED March 30, 2009.

s/ CYNTHIA IMBROGNO

UNITED STATES MAGISTRATE JUDGE